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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RULE 29.1 STATEMENT

Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari at ii-vii.

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The United States concedes that this case presents the question "whether it is the role of the Department of Justice or the court" to decide if modification of a consent decree will be procompetitive. U.S. Opp. 10 n.7. The United States also concedes that the D.C. Circuit's ruling "assigns that role to the Department" by requiring courts to enter modifications they find anticompetitive so long as DOJ's position has a "reasonable basis." U.S. Opp. 10 n.7. Thus, despite the rhetoric of the Bell Operating Company ("BOC") respondents, there is no dispute that this case squarely presents the allocation-of-powers question identified in the petition for certiorari.

Nor is there any serious dispute as to the importance of that question.[1] The standard adopted below would control both the modification and the initial entry of antitrust consent decrees, U.S. Opp. 6-7, and encompass *all decrees* to which the government is a party, including environmental and civil rights decrees. *See* Petition for Certiorari, at 21 ("Pet."); BOC Opp. 14. Respondents have offered no good reason why the Court should decline to clarify the proper role of district courts in exercising these important and recurring responsibilities.[2]

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[1] Indeed, the Court has granted review to resolve the related question of a court's role in considering consensual motions to vacate a judgment. *Izumi Seimitsu Kogyo Kabushike Kaisha v. U.S. Philips Corp.*, No. 92-1123 (S. Ct. argued Oct. 12, 1993). The United States' *amicus* brief in *Izumi* recognizes the relationship between the court's role in that context and its role in considering consent decree proposals. Brief for the U.S. as *Amicus Curiae* Supporting Respondents, at 27 (filed May 25, 1993).

[2] The BOCs—but not the United States—have misrepresented the prior petition for certiorari in this case by suggesting that it raised the allocation-of-powers question presented here. BOC Opp. 6, 10. The *only* issue raised in the petition for review of the D.C. Circuit's 1990 ruling was one of decree interpretation—the court's refusal to apply the standard for modification contained in the decree. Petition for a Writ of Certiorari, *MCI Communications Corp. v. United States* (No. 90-9, filed June 28, 1990). Nor did the application to stay the district court's decision on remand concern the circuit

1. Because the question presented is so plainly important, respondents devote most of their energy to attempting to rationalize the D.C. Circuit's dubious result. They fail, however, to come to grips with Congress's clear answer to the question whether "it is the role of the Department of Justice or the court" to determine the competitive impact of a decree proposal. Nothing in the text of the Tunney Act entrusts the public interest determination to DOJ or sets forth a "reasonable basis," "arbitrary and capricious," or "substantial evidence" standard of review, or any other standard limiting a court's ability to weigh evidence and find facts independently. To the contrary, the Act provides that "the *court shall determine* that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e); App. 127a (emphasis added).[3]

That the Tunney Act vests district courts with discretion regarding the *procedures* needed to review decree proposals (BOC Opp. 21-23 & n.21) confirms rather than contradicts the Act's requirement of an independent judicial role in making findings of fact necessary to the public interest determination. Although the Tunney Act does not *require* courts to "engage in elaborate fact-finding missions" (BOC Opp. 23), the Act explicitly *authorizes* courts to take extensive lay and expert evidence, including evidence from intervenors. 15 U.S.C. § 16(f); App. 128a. Thus, the text of the Act supports a district court's authority to find facts on competitive impact. To prohibit a

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court's "reasonable basis" standard, which had not yet been formulated.

[3] The BOCs' reliance on *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (BOC Opp. 18), undermines their position because in that case Congress had specifically delegated to the FCC the duty to make a public interest determination, and expressly subjected that judgment to *limited* judicial review under the APA. 436 U.S. at 810 ("the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance"); *id.* at 793, 795, 803; 47 U.S.C. §§ 307, 402(a); 28 U.S.C. § 2342(1); 5 U.S.C. § 706(2)(A). *See also United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434 (1st Cir. 1990), *cited in* Pet. 16 n.25.

district court from weighing and resolving conflicts in the evidence Congress authorized it to elicit—as the decision below does—is flatly inconsistent with the Act.

Respondents' argument that the Tunney Act does not explicitly apply to decree modifications (BOC Opp. 20; U.S. Opp. 8 n.5) is a red herring because the United States concedes that "uncontested modifications should be approved so long as the modifications satisfy the public interest standard embodied in the Tunney Act," U.S. Opp. 8 n.5 (citations and internal quotations omitted), and the court of appeals applied that standard. 993 F.2d at 1576; App. 10a; 900 F.2d at 295; App. 91a.[4] Thus, whether the public interest inquiry is considered a direct application of the Tunney Act, or a common law approach incorporating the "Tunney Act standard," the question presented here must be resolved.[5]

2. The BOCs defend the D.C. Circuit's "reasonable basis" standard as necessary to prevent judicial interference with executive "policy" judgments. BOC Opp. 1,

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[4] Moreover, numerous courts considering requests to modify decrees purport to apply the Tunney Act "standard" and procedures without explicitly reaching the issue of the statute's application. *See, e.g., United States v. Columbia Artists Mgmt.*, 662 F. Supp. 865, 869 (S.D.N.Y. 1987) (Tunney Act public interest "standard" applies to uncontested proposal for termination of consent decree); *United States v. General Elec. Co.*, 1977-2 Trade Cas. ¶ 61,659 (E.D. Pa. 1977) (court applies Tunney Act procedures in making public interest determination). Indeed, in the original "Modified" Final Judgment proceedings in this case, the district court's public interest findings under the Tunney Act were challenged on direct appeal to this Court, and summarily affirmed. *Maryland v. United States*, 460 U.S. 1001 (1983). Chief Justice Rehnquist's dissenting opinion questioned the constitutionality of the Tunney Act, but not its application to the MFJ. 460 U.S. at 1003-06.

[5] Only if the "standard" contained in the Tunney Act is somehow different from the Tunney Act itself—a metaphysical distinction no respondent attempts to support—would this Court need to reach the subsidiary question whether the Tunney Act applies to decree modifications. That question has never been resolved by this Court, and, as noted above, *supra* n.4, has been avoided by the lower courts.

10, 12, 17-18. But DOJ makes no such claim of executive prerogative on its own behalf. The United States recognizes that the D.C. Circuit's ruling requires deference to DOJ *on the question of competitive impact,* not on "policy" issues. U.S. Opp. 10 n.7; 993 F.2d 1577; App. 11a-12a; 900 F.2d at 308, 309; App. 119a-121a.[6] The threshold determination of anticompetitive effect is not a "policy" issue committed to the executive.[7]

The United States offers a different rationale for restricting district courts to reasonable-basis review. It contends this restriction is appropriate because competitive impact is a "predictive" judgment. U.S. Opp. 9-10 n.7. Courts, however, routinely make "predictive judgments" about likely competitive impact in contested antitrust cases, whether or not the government is a party. These "predictive judgments" are always treated as findings of fact subject to clearly erroneous review, and no deference is paid to the government's or any other party's "prediction." *See* Pet. 17 n.28.[8] Courts do not lose their

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[6] Thus, this case does not involve "the appropriate allocation of necessarily finite administrative resources" (BOC Opp. 18-19), "political or social judgments," or legislative policy (BOC Opp. 1). *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981), is not to the contrary. In *Bechtel* the court merely held that deference was owed DOJ on *social and political* issues. 648 F.2d at 666. The policy issue in *Bechtel* was the relationship between a consent decree, the Arab boycott of Israel, and a newly enacted statute regarding foreign boycotts.

[7] Petitioners do not claim that the decision below requires "abject deference" to DOJ's views. *See* BOC Opp. 2, 9, 11. The decision requires deference whenever DOJ's views are reasonable and have substantial factual support. That degree of deference, instead of independent judicial resolution of disputed facts, is not "abject" but is inappropriate and inconsistent with the common law and Tunney Act public interest test.

[8] In addition, district courts routinely determine the likely harm to litigants and the public stemming from the denial or issuance of an injunction, the likely effect of proposed remedies in institutional reform litigation, the potential danger to society if a criminal defendant is released pending trial, the "future dangerousness" of a convicted criminal in proceedings to determine if the death penalty

competence to determine competitive impact when the government settles a case.

The BOCs further argue that deference is owed to DOJ because the information services restriction is in the decree only as a result of the parties' consent, which has now been withdrawn. BOC Opp. 5, 15 n.11. But *every* provision in the decree required the parties' initial consent. The controlling fact under the common law and the Tunney Act is not that the parties reached an agreement, but that they chose to seek judicial adoption of that agreement.[9] Judicial orders, unlike private agreements, must be consistent with the public interest. *See* Pet. 21 & nn.34, 35. An order to lift a restriction found necessary to protect competition is no different.[10] Although the parties' decision to compromise is entitled to

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should be imposed, or the likely "chilling effect" of a law or regulation challenged on first amendment grounds, to name just a few examples. In none of these cases is a court bound to accept any reasonably supported government prediction.

[9] *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 117 (1932) (defendants "chose to consent, and the injunction, right or wrong, became the judgment of the court"). Thus, in *Izumi* the United States recognized a court's duty to ensure that consent decree proposals are consistent with the underlying laws. U.S. Brief *Amicus Curiae, supra* n.1, at 27.

[10] After an extensive, independent public interest analysis, the district court approved the MFJ, finding, *inter alia*, that the information services restriction was "necessary" to prevent further abuse of the local operating companies' bottleneck power. 552 F. Supp. at 189. The BOCs contend that in 1982 the district court recognized that the need for line-of-business restrictions would disappear in time, BOC Opp. 4 (citing 552 F. Supp. at 194-95 & n.264), but they omit the remainder of the cited passage; the district court merely stated that the need for the restrictions might disappear *if market conditions such as the BOCs' monopoly power over local facilities changed*. In its most recent ruling, the district court found, based on overwhelming evidence, that the BOCs still possess monopoly power over local facilities and that under current market conditions competition would be eliminated were the BOCs permitted to enter the information services market. 767 F. Supp. at 315, 326; App. 35a-37a, 61a.

some deference in the sense that the court should not insist on the "best possible" settlement, *see infra* p. 8, a court must ensure that its orders are consistent with the underlying statute at issue.

Moreover, petitioners are aware of no case that precludes a district court from weighing evidence and finding facts when DOJ's motion is *opposed* by a party to a decree, and there is no principled basis for affording greater deference to DOJ when its motion is joined by a private party. DOJ does not become the arbiter of the public interest merely because a self-interested private party joins its motion. A third party's wishes cannot strip a court of its duty to resolve disputed facts in order to ensure that its orders are consistent with the public interest.

3. The BOCs contend that APA-style review is appropriate even though DOJ is not acting as an administrative agency. BOC Opp. 18 n.14. Without legislative direction, however, courts have no basis for ceding to the executive branch virtual control over exercise of the courts' Article III powers. Congress has the power to vest an executive agency with authority to hold proceedings and make "public interest" determinations with independent legal significance, and can subject those findings to limited judicial review, but it has not done so here. Indeed, the Tunney Act expressly requires the courts to determine the public interest.

4. Review is also warranted to resolve the conflict and confusion that currently exists regarding the proper judicial role in reviewing proposed consent decrees. To obfuscate the need for review, respondents have mischaracterized the holding of *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). BOC Opp. 15-16; U.S. Opp. 10. In *Cyanamid*, the district court declined to apply a modification standard set forth in the decree, and instead applied a "public interest" test. The Second Circuit expressly held that it did not matter which test was applied

because the public interest test—properly understood—was substantively identical to the test contained in the decree. 719 F.2d at 565. The appeals court reversed the district court because it had failed to make an independent determination whether the proposed modification would be anticompetitive; the district court had accordingly erred by "deferr[ing] to the judgment of the Department of Justice." 719 F.2d at 566-67.[11] Thus, the district court in *Cyanamid* applied the same standard the D.C. Circuit adopted here, and the Second Circuit reversed.

Respondents are similarly cavalier in their claims that "all lower courts" are in accord with the views expressed by the D.C. Circuit in this case (BOC Opp. 12). Indeed, *Cyanamid* was followed outside the Second Circuit in *United States v. Jas. H. Matthews & Co.*, 1989-1 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989), where the court made detailed, independent findings of fact as to the likely effect on competition of terminating the decree. The court held that while a "degree of deference" is due to DOJ, the court was required to decide whether termination would be anticompetitive and therefore inconsistent with the public interest. *Id.* at 60,434. Moreover, courts applying the public interest standard to proposed environmental and civil rights decrees routinely engage in independent resolution of disputed facts.[12]

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[11] The BOCs (but not the United States) contend that *Cyanamid* was limited to the issue of "the Department's attempt to disavow *Brown Shoe*," and that *Cyanamid* therefore stands only for the proposition that "DOJ is bound to follow Supreme Court precedent." BOC Opp. 15-16. Nothing in *Cyanamid* suggests that DOJ was refusing to follow Supreme Court precedent; the decision merely states that the *district court* erred by ignoring *Brown Shoe and* by deferring to DOJ. 719 F.2d at 567. The decision clearly states that deference to DOJ is not appropriate and that the district court was required "to make findings of fact" on the state of the market. 719 F.2d at 566-67.

[12] *See* Pet. 21 n.36. Thus, a conflict plainly exists between *Matthews*, *Cyanamid*, and numerous environmental and civil rights decisions, on the one hand, and certain cases cited by respondents such as *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade

Respondents' repeated citation to lower court cases using the phrase "reaches of the public interest," *see, e.g.*, BOC Opp. 13, 21-22; U.S. Opp. 7, 10, does not demonstrate uniformity on the question presented here. That language was first used in *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975), to convey the unremarkable proposition that when the government chooses to settle a case as an initial matter,

> [i]t is not the court's duty to determine whether this is the *best possible settlement that could have been obtained if, say, the government had bargained a little harder.* The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.

406 F. Supp. at 716 (emphasis added). The "reaches of the public interest" standard means only that a district court is not free to reject one *procompetitive* proposal

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Cas. ¶ 61,508 (W.D. Mo. 1977), and *United States v. National Finance Adjusters*, 1985-2 Trade Cas. ¶ 66,856 (E.D. Mich. 1985) (U.S. Opp. 7-9), on the other.

A number of the cases respondents rely on (U.S. Opp. 9 n.6; BOC Opp. 13-14 n.7), however, simply do not reach the question of a court's ability to resolve conflicts in the evidence in making the competitive impact determination, or do not otherwise support respondents' position. *See, e.g., Sam Fox Pub. Co. v. United States*, 366 U.S. 683 (1961) (sole issue was intervention); *United States v. Associated Milk Prods.*, 534 F.2d 113 (8th Cir.) (same), *cert. denied*, 429 U.S. 940 (1976); *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642 (D. Del. 1983) (same); *United States v. Stroh Brewery*, 1982-2 Trade Cas. ¶ 64,804 (D.D.C. 1982) (same; court nevertheless confirmed that it would make the public interest determination); *United States v. Yoder Bros.*, 1989-2 Trade Cas. ¶ 68,728 (N.D. Ohio 1986) (government's evidence was unrebutted); *United States v. Louisiana Pac. Corp.*, 1990-1 Trade Cas. ¶ 69,077 (D. Or. 1990) (review of agency action under the APA); *United States v. Columbia Artists Mgmt.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987) (no evidentiary conflicts; court nevertheless determined whether the government's explanation was both reasonable and "persuasive").

in favor of a second *procompetitive* proposal it believes would be superior.[13]

Thus, lower courts have generally agreed on an issue *not* presented here: deference to the government's decision not to bargain harder to obtain the "best possible" procompetitive settlement.[14] The issue presented here, however, is whether a district court has the authority to weigh evidence and make an independent determination whether a proposed modification will be procompetitive or anticompetitive. On that question, the lower courts are plainly divided.

5. Respondents do not dispute that the allocation-of-powers questions could have been avoided had the court of appeals applied the decree's built-in standard for modification, section VIII(C), rather than the general public interest standard. The BOCs' contention that the parties to the decree "explicitly agreed" that the general public interest test would govern future consensual modifications, BOC Opp. 5, is absurd. The D.C. Circuit searched for evidence of the parties' intent because it found the parties had not explicitly agreed. 900 F.2d at 291; App. 83a. In its search, however, the court failed to take into account the interpretation of one critical "party"—the district court that drafted the provision at issue—and failed to consider the history of the provision and its interpretation by the litigating parties. That fundamental

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[13] The *Gillette* court did not limit itself to reasonable-basis review. It held hearings and considered extensive evidence from intervenors, following which the proposed decree was modified as a result of the court's suggestions. *See* 406 F. Supp. at 715, 716.

[14] For example, the court in *United States v. Alcan Aluminum*, 605 F. Supp. 619, 622 (W.D. Ky. 1985), *cited in* U.S. Opp. 9 n.6; BOC Opp. 22 n.20, evaluating a proposed decree as an initial matter, followed this standard but made an independent determination that the "pro-competitive interests advanced [in the decree] outweigh" anticompetitive concerns.

error in decree interpretation conflicts with settled decisions of this Court and other circuits. *See* Pet. 23-26.[15]

6. The BOCs previously argued that the petition for review of the D.C. Circuit's first ruling and the application to stay the district court's decision on remand were premature. Now they argue that it is *too late* for the Court's review because they have invested heavily in information services. BOC Opp. 11. That, however, is not a legitimate reason to leave unresolved a legal issue of national importance. The BOCs knew that this case was not final when they made investment decisions. Indeed, they argued to this Court that the district court's stay—which was intended to eliminate the risk that "substantial funds could be spent in reliance on a decision which could subsequently be vacated" (767 F. Supp. at 333; App. 75a)—was unjustified because the BOCs would "structure their own transactions in such a way as to minimize potential risks" stemming from a later reversal of the district court's decision. BOC Opp. to Applic. for Stay, at 16, No. A-91-267 (filed Oct. 22, 1991). The BOCs cannot now be heard to argue that their investments should preclude plenary review.

CONCLUSION

The Petition should be granted.

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[15] The BOCs' statement that "no party to the decree questioned the Court of Appeals' interpretation," BOC Opp. 25, tells only half the story. The court of appeals found it "surprising[]" that when asked about the court's interpretation of the decree at oral argument, DOJ *took no position*. 900 F.2d at 294 n.11; App. 90a. That is not, in fact, surprising, because DOJ had never taken the position that section VIII(C) applied only to contested modifications, and DOJ and the BOCs had filed over one hundred motions under section VIII(C) in the years following entry of the decree—including the motions at issue here.

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